



2010

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Recommended Citation

Thomas Kleven, *Federalizing Public Education*, 55 Vill. L. Rev. 369 (2010).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol55/iss2/3>

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2010]

FEDERALIZING PUBLIC EDUCATION

THOMAS KLEVEN*

THIS Article assesses the case for federalizing public education in the United States. In Part I, I argue that democracy requires a principle of equitable sharing pursuant to which the goods and bads of social life must be fairly distributed among all society's members. Part II explores what equitable sharing says about society's obligation to provide for children's education, and concludes that in the modern world it requires society to afford all children access to a formalized and relatively equal educational opportunity of some type.

Part III examines how society might go about fulfilling that obligation. Assuming that democratic principles require that parents have a primary role in raising their children, subject to society's right to intervene in that relationship in order to protect children's right to comparable educational opportunities, Part III considers the merits of total private provision versus total public provision versus some combined approach such as a voucher system where the government finances education but parents choose the particular setting. It concludes that under relatively egalitarian social conditions all three approaches might produce comparable educational opportunities, and that under inegalitarian conditions none are likely to do so, although a government-run or a voucher system would likely come closer than total privatization.

Part IV examines in the abstract the responsibility of government to provide for equal educational opportunity in a federal system. It concludes that the national government must assume that responsibility to the extent necessary to ensure comparability, that under egalitarian social conditions both national and lower level provision of education might suffice, and that under inegalitarian conditions total or substantial federalization seems the most viable way to minimize educational inequalities. Finally, Part V examines the real-world context of the United States. It concludes that total privatization would likely produce a highly stratified and unequal system of education, that at a minimum full federal financing of education seems necessary to promote comparable educational opportunity, and that whether the federal or state and local governments are more suited to administer other aspects of education than financing is an open question.

I. THE DEMOCRATIC REQUIREMENT OF EQUITABLE SHARING

I call the conception of democracy I propose equitable sharing, meaning that all the goods (and bads) of social life must be fairly distrib-

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uted among all society's members.¹ One route to equitable sharing posits the inherently equal moral worth of every individual, and presupposes society as based on a social compact unanimously agreed to through an egalitarian interaction among those individuals.² Under those conditions, I

1. Resonances of equitable sharing are present in the moral underpinnings of this society, in particular the Declaration of Independence: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). And they are present in the thinking of many political philosophers. See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 311-12 (1989) ("The close connection between democracy and certain kinds of equality leads to a powerful moral conclusion: If freedom, self-development, and the advancement of shared interests are good ends, and if persons are intrinsically equal in their moral worth, then opportunities for attaining these goods should be distributed equally to all persons. Considered from this perspective, the democratic process becomes nothing less than a requirement of distributive justice."); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 27 (1690), available at <http://www.constitution.org/jl/2ndtr05.txt> ("Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."); KARL MARX, *CRITIQUE OF THE GOTHA PROGRAM* pt. I (1875), available at <http://marxists.org/archive/marx/works/1875/gotha/ch01.htm> ("In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor, has vanished; after labor has become not only a means of life but life's prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!"); JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971) ("All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of those values is to everyone's advantage."); MICHAEL WALZER, *SPHERES OF JUSTICE* 84 (1983) (arguing that a democratic social contract requires "that every political community must attend to the needs of its members as they collectively understand those needs; that the goods that are distributed must be distributed in proportion to need; and that the distribution must recognize and uphold the underlying equality of membership"); Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE* 67, 69 (S. Benhabib ed., 1996) ("The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all.").

2. To approximate an egalitarian interaction is the purpose of Ackerman's Spaceship, Habermas's "ideal speech situation," and Rawls's Veil of Ignorance. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 6, 11, 24-45 (1980) (hypothesizing, as a basis of establishing "the foundation of all claims of right," a dialogue among space travelers about to create a political community on a new and uninhabited planet and constrained by a "principle of Neutrality" that illegitimizes assertions that one's "conception of the good is better than that asserted by any of his fellow citizens" and that one "is intrinsically superior to one or more of his

contend, people would only agree to a social compact containing a principle of equitable sharing.

Since the equal worth and egalitarian interaction constraints dictate an egalitarian outcome, there is an obvious circularity here. Nevertheless, the constraints are necessary because without them a social compact might produce results inconsistent with democratic principles. For example, a person in a disadvantageous position might agree to all sorts of heinous arrangements, such as slavery, that are hard to reconcile with the word democracy.³ Under egalitarian conditions, it is hard to imagine that rational people would ever agree either to submit to slavery or to cooperate with each other in some venture unless all were guaranteed an equitable share of their joint efforts. Consequently, a social compact arising from and perpetuating power imbalances is unconscionable and not fully democratic.⁴

A second route to equitable sharing presupposes that people are born into or embedded in pre-existing societies from which exit is physically and psychologically difficult, such that the occasion to enter into an egalitarian

fellow citizens"); JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 57-94 (1993) (advancing, as a means of establishing the validity of contested norms, a "discourse ethics" that "rules out all external and internal coercion other than the force of the better argument and thereby rules out all motives other than that of the cooperative search for truth," and that requires valid norms to fulfill the condition that "all affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *every-one's* interests"); RAWLS, *supra* note 1, at 12, 136-42 ("The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.").

3. By definition, democracy stipulates people's right to participate in societal decision making. To willingly bargain away that right, although participatory as an isolated act, produces an undemocratic result because thereafter the person no longer has the right to participate. Therefore, the right to participate in societal decision making must remain inalienable in a democratic society. See, e.g., DAHL, *supra* note 1, at 114 (distinguishing between the permissible delegation of decision making pursuant to a revocable grant of authority and the impermissibility of alienating full control over decision making as inconsistent with democratic principles).

4. See, e.g., Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982) (identifying fairness and efficiency as the ethical force underlying the principle that people should be held to their bargains; arguing that bargains lacking in fairness and efficiency are consequently unworthy of full enforcement on grounds of unconscionability; and identifying as factors giving rise to unconscionable bargains the exploitation by one party of another's distress, bargaining incapacity, and lack of knowledge); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 447, 491 (1994) (arguing that "the private orderings of people who belong to a class-oriented society will passively, though relentlessly, reinforce the existing class structure," and that "[i]f one's consent to the terms of a contract is the function of class-based injuries, it is hard to defend the bargain on either fairness or efficiency grounds").

tarian social compact never arises.⁵ Nonetheless, people adhere to the principle that all its members are of inherently equal moral worth out of feelings of solidarity among fellow members, or because equal worth is seen as intrinsic to the concept of membership.⁶ Such a society, I contend, would adopt a requirement of equitable sharing (as well as other democratic principles) because equitable sharing necessarily follows from a commitment to equal moral worth.

Again, there is circularity in that the premise of equal moral worth dictates an egalitarian outcome. But, again, the constraint is needed because without it outcomes incompatible with the meaning of the word democracy might result. For example, without the constraint of equal moral worth in a society into which people are born or embedded and from which they cannot feasibly exit, a powerful minority might seize control

5. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (2d ed. 1998) (“[T]o say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity . . . as defined to some extent by the community of which they are a part. For them, community describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.”).

6. See, e.g., *id.* at 32-35, 168-73 (advancing, as a means to achieve the same ends in terms of interpersonal relations as a focus on justice and individual rights, sentiments of benevolence, fraternity, and love arising out of the experience of community). Sandel states:

[I]n so far as our constitutive understandings comprehend a wider subject than the individual alone, whether a family or tribe or city or class or nation or people, to this extent they define a community in the constitutive sense. And what marks such a community is not merely a spirit of benevolence, or the prevalence of communitarian values, or even certain “shared final ends” alone, but a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of the participants is reduced if never finally dissolved. In so far as justice depends for its pre-eminence on the separateness or boundedness of persons in the cognitive sense, its priority would diminish as that opacity faded and this community deepened.

Id. at 172; see also WALZER, *supra* note 1, at 64 (arguing that the members of a democratic political community owe each other “the communal provision of security and welfare” because “[i]f we did not provide for one another . . . we would have no reason to form and maintain political communities”). Walzer characterizes that duty as based on

an agreement to redistribute the resources of the members in accordance with some shared understanding of their needs, subject to ongoing political determination in detail. The contract is a moral bond. It connects the strong and the weak, the lucky and the unlucky, the rich and the poor, creating a union that transcends all differences of interest, drawing its strength from history, culture, religion, language, and so on. Arguments about communal provision are, at the deepest level, interpretations of that union. The closer and more inclusive it is, the wider the recognition of needs, the greater the number of social goods that are drawn into the sphere of security and welfare.

WALZER, *supra* note 1, at 82-83.

and deny others the right to participate in societal decision making. Or, although all have a formal right to participate, without a requirement of equitable sharing a majority might ignore or exploit the minority and appropriate for itself the lion's share of the goods of social life. Such a society is not worthy of being called democratic.

Equitable sharing, of course, is a vague term. Consequently, even those who adhere to the principle are likely to disagree over the particulars of what it requires in practice. To some, equitable sharing may require the equal distribution of all the goods of social life;⁷ to others, the distribution of goods in accordance with need;⁸ and to still others, the provision of a basic minimum.⁹ For this Article, the question is what equitable sharing requires as regards children's access to an education.

II. EQUITABLE SHARING AND PUBLIC EDUCATION

Education, broadly conceived, encompasses all one learns throughout life, and comes from many sources. This Article focuses on formalized schooling at the elementary and secondary levels as generally provided today in public or private schools throughout the world. In some contexts, like a preliterate tribal society, equitable sharing may not require formalized schooling at all. In modern times it does, as evidenced by the universality of formalized schooling and its centrality to a successful social life.¹⁰

Formalized schooling in a democratic society serves two primary purposes. First is self-development: to assist children to acquire the capacities,

7. See, e.g., G.A. Cohen, *Back to Socialist Basics*, 207 NEW LEFT REV. 3, 11 (1994) ("The principle of equality says that the amount of amenity and burden in one person's life should be roughly comparable to that in any other's.").

8. See, e.g., MARX, *supra* note 1 ("From each according to his ability, to each according to his needs!"); WALZER, *supra* note 1, at 84 (noting that "goods that are distributed must be distributed in proportion to need").

9. See, e.g., JOHN BAKER, ARGUING FOR EQUALITY 3-10, 49 (1987) (arguing that true equality requires society "to give everyone the means to develop their capacities in a satisfying and fulfilling way," and that this requires every person to have their basic needs met, the minimization of economic inequality, the right to meaningful work, and the democratization of all aspects of social life); CAROL GOULD, RETHINKING DEMOCRACY 35-71, 209-14 (1988) (arguing that the value of freedom includes the affirmative right to the social and material conditions necessary for realizing individual self-development, that the principle of equality requires that this right be equally available to all, and that the right includes a right of access to the means of subsistence); STEPHEN R. MUNZER, A THEORY OF PROPERTY 227-30, 241-47 (1990) (arguing that the principle of justice and equality requires sufficient property, to the extent society is able to provide it, to enable all to meet the basic needs and develop the basic capabilities necessary for a decent human life).

10. Other institutions like the family and the church, as well as self-learning and informal relationships, also play important educational roles. And there are ongoing debates over which aspects of children's education belong in school, and in particular in public school, and which should or may be provided elsewhere. Debates over home education and vouchers are examples, and I will allude to them as the discussion proceeds. The ultimate question is what equitable sharing requires as regards formalized schooling.

knowledge, and skills to prosper and achieve fulfillment as self-determining adults of inherently equal moral worth.¹¹ Second is socialization/ac-culturation: to assist children to acquire the knowledge needed to understand and participate effectively in the democratic process and to cultivate among children respect for and the ability to interact with others as beings of inherently equal moral worth.¹² Without capacities—without the ability to read and write, to reason and analyze—most people would be hard-pressed to provide for themselves, to make informed decisions about what is in their best interests, or to attend adequately to the needs of their children. Therefore, equitable sharing requires access to these capacities. Without an understanding of how society's political and economic institutions function, and without the ability to evaluate the pros and cons of public issues, few people could participate intelligently in the democratic process. Therefore, equitable sharing requires access to this knowledge. Without mutual respect among its members and a willingness to give others their due, a society would have difficulty in functioning democrati-

11. See, e.g., ACKERMAN, *supra* note 2, at 139 (“A system of liberal education provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.”); JOHN DEWEY, *The Child and the Curriculum* (1902), in *THE SCHOOL AND SOCIETY & THE CHILD AND THE CURRICULUM* 179, 187 (Univ. of Chicago Press 1990) (1915) (“The child is the starting-point, the center, and the end. His development, his growth, is the ideal. It alone furnishes the standard. To the growth of the child all studies are subservient; they are instruments valued as they serve the needs of growth. Personality, character, is more than subject-matter. Not knowledge or information, but self-realization, is the goal.”).

12. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.”); see also JOHN DEWEY, *The School and Society* (1915), in *THE SCHOOL AND SOCIETY & THE CHILD AND THE CURRICULUM*, *supra* note 11, at 29 (asserting that the goal of education should be “to make each one of our schools an embryonic community life. . . . When the school introduces and trains each child of society into membership within such a little community, saturating him with the spirit of service, and providing him with the instruments of effective self-direction, we shall have the deepest and best guaranty of a larger society which is worthy, lovely, and harmonious”); AMY GUTMANN, *DEMOCRATIC EDUCATION* 42 (1987) (“[A] democratic state recognizes the value of political education in predisposing children to accept those ways of life that are consistent with sharing the rights and responsibilities of citizenship in a democratic society. A democratic state is therefore committed to allocating educational authority in such a way as to provide its members with an education adequate to participate in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens.”); MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 102-03 (1999) (“Future citizens must be taught to exemplify the virtues characteristic of a liberal democracy . . . to respect and value the democratic process, . . . to think critically and carefully . . . [and] to tolerate and respect other citizens and their differences.”).

cally and in complying with the principle of equitable sharing. Therefore, equitable sharing requires society to cultivate mutual respect.

Knowledge, skills, and acculturation can certainly be, and are, obtained elsewhere than through formalized schooling. But, absent such schooling, their attainment may not adequately meet people's needs nor comport with equitable sharing. Without formalized schooling, people would have to find other means of obtaining for themselves and their children the skills and knowledge needed to function successfully in social life. Some might self-educate. But the skills and knowledge needed to thrive in the modern world often demand skilled and knowledgeable teachers. Relatively few seem capable of teaching themselves or their children as well as experienced professionals. Some might employ private tutors. But that would likely be beyond the means of most people. Some employers might provide education for their workers if unable to find qualified people. But on-the-job training would often likely consist of the specific skills and knowledge needed to perform particular tasks, rather than the more generalized education that helps prepare people for all aspects of social life—from an understanding of how society functions to the ability to create or interpret a work of art.

Consequently, while absent formalized schooling a few might receive a high-level education, some (perhaps many) would likely receive little or none, and the quality of education people receive would likely be highly uneven. This does not comport with the democratic principle of equitable sharing. Society must somehow provide people with the opportunity for a formalized education. Moreover, because education is so critical to people's ability to prosper in modern times, I contend that the principle of equal moral worth and the requirement of equitable sharing mandate society to ensure that all children have access to a relatively equal educational opportunity—i.e., a comparable opportunity to advance educationally as far as their abilities, interests, and willingness to strive allow—at least through elementary and secondary school.¹³

13. See, e.g., *Brown*, 347 U.S. at 493 (“Today, education is perhaps the most important function of state and local governments. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”). Whether democratic principles also require comparable access for all to a college-level education, or permit people's earnings to depend on their fortuitously acquired native abilities, are relevant and debatable questions. But they are beyond the scope of this Article. The contention at this point is simply that until their late teens, the time in this society at which children are assumed to become adults and must begin to assume adult responsibilities, equitable sharing requires that all children have access to comparable educational opportunities through secondary school. Whether it is consistent with democratic principles and equitable sharing to allow them to fend for themselves thereafter is a question for another day.

Comparability does not necessarily mean sameness of treatment in all instances, however, because people's needs differ. Rather, it means the same or similar treatment when people are similarly situated¹⁴ and proportionate responsiveness to need when needs differ.¹⁵ Proportionate responsiveness is required when needs differ because equal treatment would

14. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532 (1996) (holding that exclusion of women from Virginia Military Institute and provision of parallel program for women at separate school violates equal protection because "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (holding that exclusion of men from state-supported nursing school violates equal protection). The Court in *Hogan* reasoned that:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Hogan, 458 U.S. at 724-25.

15. See, e.g., *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 56 (1999) (holding that Individuals with Disabilities Education Act's requirement that school authorities furnish services designed to meet the "unique needs" of the disabled in order to assure them a "free appropriate public education" requires provision to student in wheelchair and on ventilator of related nursing services without which student would not be able to attend school); *Lau v. Nichols*, 414 U.S. 563 (1974) (holding Civil Rights Act of 1974's prohibition against discrimination based on national origin requires school authorities to take affirmative steps to rectify English language deficiencies of non-native English speaking students). But see *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (holding Education of All Handicapped Children Act's requirement of a "free appropriate public education" for the handicapped does not require an educational opportunity commensurate with other students but only services necessary to enable the handicapped to obtain "some educational benefit," such that sign-language interpreter need not be provided for deaf student receiving specialized instruction and performing above average). If that is a proper reading of the Act, it falls short of what equitable sharing and comparability require. While cost and other administrative factors impact the specifics, limiting the handicapped to "some" educational benefit while providing more to the non-handicapped is hard to reconcile with those requirements. See, e.g., Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006) (arguing with regard to women's participation in athletics that a principle of "substantial proportionality" underlies the prohibition against discrimination on the basis of sex in Title IX of the Education Amendments of 1972 and that the implementing regulations do not fully conform to that principle, and recommending modifications of the regulations to better further the proportionality principle); Michael A. Rabell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1452, 1470-80 (1986) (advocating a structural approach to evaluating claims of discrimination against the disabled in recognition of the fact that "the critical analytical problem of discrimination in the handicapped context now is . . . one of redesigning social structures and institutions to make them more responsive to the needs of the disabled segment of the population," and touting in the educational context a "commensurate

address the needs of some more than others and, thus, would not be comparable for all. Given the complexity of determining in practice what comparability requires, as well as human fallibility, it may be impossible to achieve total comparability of educational opportunity no matter how children are educated. Even if it were possible, other democratic values may at times compete with children's educational needs. The task for democratic theory and practice, then, is to strike an appropriate balance between children's needs and competing democratic values, and to accord children comparable educational opportunity as far as practicable under the circumstances.

III. PROMOTING COMPARABLE EDUCATIONAL OPPORTUNITY

A. *Parental Versus Governmental Child Rearing*

One way to promote comparable educational opportunity might be for the government to raise all children from birth in comparable environments and in comparable ways.¹⁶ While achieving total comparability in a government-run system responsible for raising and educating large numbers of children would be difficult, an efficiently run system with that as a primary goal might come close. It does not necessarily follow, however, that parental child rearing must be abolished.

First, if, as many believe, parents have an affinity with their children that generally leads them to be more attentive than others to their children's needs,¹⁷ parental child rearing may contribute to children's education and to ensuring comparable educational opportunities for all

opportunity standard" that balances the needs of the disabled against the opportunities provided to other children).

16. See, e.g., PAULA RAYMON, *THE KIBBUTZ COMMUNITY AND NATION BUILDING* 53-55, 233-36 (1981) (discussing the communal living arrangements of children in the early years of the Israeli kibbutzim as based on the "socialist principle that the community should replace the family" and that "[t]he kibbutz and not the parents would provide for the child," and the subsequent abandonment of the arrangement due to the tension it caused particularly for mothers who desired a more family oriented approach to child rearing).

17. See, e.g., JOHN ALCOCK, *THE TRIUMPH OF SOCIOBIOLOGY* 201, 203 (2001) ("[Natural] selection has evidently favored people with the motivational mechanisms, emotional systems, and intellectual capacities that enable us to learn kinship categories, establish kin-based links with others, educate others about genealogical relationships, and feel a sense of solidarity and cooperativeness with those identified as relatives, especially with close relatives. . . . These feelings influence our decisions about how much we are willing to invest in helping off-spring and thus they affect our interactions with spouses, children, and other components of extended families, reconstituted or otherwise."); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940 (1996) (advocating constitutional protection for parental rights regarding their children's education on the ground that "parents are more likely to pursue the child's best interest as they define it than is the state to pursue the child's best interest as the state defines it . . . [because] parents have better incentives to act in their children's perceived best interests than do the state and its delegates, and will consequently be, on average, more faithful educational guardians").

children. Attentive parents may be willing to devote more time to their children's education, and may be better able to identify their children's educational needs, than governmental personnel responsible for collectively rearing and teaching children, however well-trained and caring those officials may be. Even if governmental child rearing would contribute in some respects to comparable educational opportunities for children, parental child rearing might contribute in others. It seems impossible to say in the abstract which approach is on balance superior. Perhaps some combination of parental and governmental responsibility for rearing and educating children would be best.¹⁸

Second, the principle of equal moral worth, from which children's right to comparable educational opportunities derives, may also require that parents have a right to raise their own children even if the result is something less than fully comparable educational opportunities. A full discussion of parental rights is beyond the scope of this Article, although the evidently near-universal practice of parental child rearing throughout history lends support to parental child rearing as a right that a democratic society should recognize.¹⁹ In light of that history, I assume here that

18. See, e.g., GUTMANN, *supra* note 12, at 22-47 (considering and ultimately rejecting a "family state" model of education where a centralized state has exclusive authority over children's education, a "state of families" model where parents have exclusive authority, and a "state of individuals" model where children are educated by impartial professional educators unconstrained by political or parental authority, and advocating instead a "democratic state of education" that shares educational authority among citizens, parents, and professional educators); Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of the Egalitarian Family*, 82 S. CAL. L. REV. 1, 4 (2008) (arguing that a liberal egalitarian society, in order to reconcile a commitment both to parental prerogatives and equal opportunity for children, may on the one hand be required to support parental child rearing so as to "attenuate the link between parents' financial circumstances and children's access to food, shelter, health care, and education," and may on the other hand be entitled to impinge on parental prerogatives that impede equal opportunity such as by insisting that children attend public school).

19. See, e.g., LLOYD DEMAUSE, *The Evolution of Childhood*, in THE HISTORY OF CHILDHOOD 1 (1974) (tracing the evolution of parental child rearing over the past 2000 years or so in the West, and characterizing most of the epoch as replete with what would be viewed as child abuse by today's standards, with a more empathetic view of children and a more active role of fathers in child rearing emerging only in the past 300 years); EVELYN REED, WOMAN'S EVOLUTION 81-95, 133-43, 337-38, 393-432 (1974) (tracing the evolution of the family from the matriarchal clan system prevalent among hunter-gatherers, which consisted of the physical separation of adult females and males, and the raising of children in the female sector by mothers with the assistance of their brothers as tutors of their male children but with fathers playing no role, to the matrilineal family emerging with settlement and food production and consisting of the retention of much of the clan structure but with fathers assisting in child rearing, to the full-fledged patriarchal one-father and male-dominated family in place by the beginning of the modern era about 3000 years ago); EDWARD O. WILSON, ON HUMAN NATURE 141-42, 145 (1978) (discussing "the human disposition to assemble into families" as far back as hunter-gatherer societies, and stating "[t]he family, defined broadly as a set of closely related adults with their children, remains one of the universals of human organization").

democratic principles do require the parental right to rear their own children, subject, however, to society's right to intervene in order to protect children's right to comparable educational opportunities.²⁰ Because parental rights and children's rights may at times conflict, the task for democratic theory and practice is to achieve an appropriate balance between them. However, the contestability of the appropriate balance suggests that more than one arrangement may comport with democratic principles.

B. *The Libertarian Challenge to Public Provision of Education*

Assuming a society where parents have primary responsibility for raising children, possible ways of educating children include total public provision, total private provision, or some combination of the two.²¹ Before discussing various alternatives, let's first address claims that the public provision of children's education violates democratic principles, in which case total privatization would be the only permissible alternative. The strongest challenge is the libertarian contention, arguably deriving from the inherently equal moral worth of all, that taxing people to pay for the education of other people's children constitutes forced sharing in violation of people's individual right to be free to pursue their own destinies without interference by others, including society at large, as long as they respect others' comparable right.²² From this perspective, people's participation in col-

20. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (allowing the Amish on Free Exercise grounds to remove their children from public school after the eighth grade in order to raise them in the Amish way of life, while clearly implying that religious beliefs requiring children to remain illiterate would not override compulsory education laws); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (holding that while parents have a constitutional right to place their children in private schools, the state may require parents to educate their children and may regulate private schools to the extent needed to ensure that children receive an adequate education).

21. My view of the public-private distinction is that it operates on a continuum, that any departure from total public or private provision makes an enterprise partially both, and that most enterprises have both public and private features. Thus, if students in public schools can select their own courses, then the system is to that degree private. And if the government regulates the curriculum of private schools, then they are to that extent public. Consequently, a formally public school system and a system of formally private schools could function identically in practice through privatizing aspects of the former and publicizing aspects of the latter.

22. See, e.g., LOCKE, *supra* note 1, §§ 4-6 ("To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another. . . . The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974) ("Individuals have rights, and there are things no person or group may do to them (without violating their rights). . . . Our main conclusions

lective ventures must be voluntary only, and society's insistence that they participate against their will is a form of exploitation. Viewing society as a social compact among inherently equal people, the contention is that people would not insist on equitable sharing as a foundational principle but on a principle of individual self-determination that bans forced sharing. Viewing people as embedded in pre-existing societies, the contention is that what necessarily flows from adherence to the principle of inherent equality is not equitable sharing but rather self-determination without forced sharing.

An extended discussion of these competing views of the implications of a commitment to the inherent moral worth of all is beyond the scope of this Article. Briefly, I think that self-determination without forced sharing fails because it unjustifiably privileges those who are fortuitously born with superior capacities, unjustly dooms those who are incapable of taking care of themselves if others choose not to aid them, and impedes collective action due to irresolvable free rider problems that enable people to benefit from public goods they really want without having to pay for them.²³

The weakness of self-determination without forced sharing is especially glaring as regards children, who themselves have the inherent right of self-determination. Because children are not fully capable of self-determination, someone must care for them and prepare them for self-determination until they are capable. A ban on forced sharing should place the responsibility, at least initially, on those who choose to bring children into being. In order to protect children's right of self-determination, and to deter people who choose to have children from imposing on others, society as a whole should be entitled to compel the unwilling to fulfill their responsibility as parents. But what if some parents are unable to comply and no one volunteers? If at this point society as a whole is not obligated to step into the breach, the result is the moral monstrosity of children unable to care for themselves being left to flounder or die. And if society is so obligated, it should have the right to require that everyone contrib-

about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified. . . . [T]he state may not use its coercive apparatus for the purpose of getting some citizens to aid others.").

23. See, e.g., Craig Duncan, *The Errors of Libertarianism*, in *LIBERTARIANISM: FOR AND AGAINST* 45, 50-54, 59-61 (C. Duncan & T.R. Machan eds., 2005) (contending that libertarianism fails to adequately protect human dignity in tolerating the exploitation of the less powerful by the more powerful and impedes collective action through the incentive to free-ride); Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 *PHIL. & PUB. AFF.* 105, 133, 138 (2001) ("So we arrive at the peculiar possibility: The world and all within it can be someone's (or more likely some class's) property, with all but one (person or group) devoid of freedom and independence—and yet all is right and just since libertarian procedures and side-constraints have been satisfied. . . . Libertarianism has no place for government to enforce the provision of public goods, those goods not adequately and effectively provided for by markets.").

ute, i.e., to engage in forced sharing, so as to prevent those who would not voluntarily contribute from forcing on others their share of the cost of society's obligation. In short, a society based on individual self-determination may require forced sharing for the provision of obligatory collective goods, one of which relates to children's education.

Now of what does the parental responsibility toward children consist regarding their education in a society based on individual self-determination and parental rights? To leave children uneducated would not suffice today, since they would not be prepared for self-determination as adults. Society, then, should have the right to compel parents to provide for their children's education. But what level of education? My answer, given equal moral worth and children's right of self-determination, is that society could and should mandate a comparable educational opportunity for all children. If some parents are unable to comply, or if generally privatized education fails to ensure comparable educational opportunity, then society must publicly provide for children's education to the extent necessary to promote comparable opportunity but without overly impinging on parental rights. And society may require that everyone contribute to the public provision of education in order to fulfill its obligation and prevent free riders. In short, when it comes to children's education in a society based on self-determination without forced sharing, we end up with what equitable sharing would require by another route.

C. Private Versus Public Provision of Education: Five Alternatives

Now let's consider five alternatives for providing for children's education, all of which entail compromises between parental and governmental responsibility for children's right to comparable educational opportunity. Under all the alternatives education is compulsory (and at least to that extent public), so as to ensure that children actually receive the education to which they are entitled. The alternatives are ordered from most to least governmental responsibility, such that as governmental responsibility decreases parental responsibility increases, and vice versa.

The alternatives are: (1) the government provides a free education, i.e., an education paid for through taxation, to all children in a government-run public school system that all are required to attend; (2) the government provides a free education as in (1), except that parents may opt out of the government-run system and educate their children at their own expense in private schools or at home; (3) the government furnishes parents with vouchers that can be used toward tuition at a publicly or privately run school of their choice or to defray the cost of educating their children themselves; (4) education is generally privatized, meaning that parents must pay for it out of their pockets, but the government subsidizes the education of children whose parents cannot afford it; and (5) education is totally privatized, meaning that parents must provide for their children's

education with no government involvement whatsoever other than the requirement to educate them.

1. *(1) Government-Run Public Schools Versus (5) Total Privatization*

Let's first contrast alternatives (1) and (5), i.e., free compulsory education in a government-run system versus totally privatized but still compulsory education. In a relatively egalitarian society without substantial differences among people's wealth, education, and political power, whether total privatization or a government-run system would fare better in promoting comparable educational opportunity seems an open question, dependent on whether under egalitarian conditions the marketplace or the political process would be more attentive to children's educational needs. Either way, the consequences might be similar. The same people might be drawn to the teaching profession. With total privatization most parents would likely choose private schools of some type, and the quality and diversity of these schools might be similar to what a government-run system would offer. A government-run system could replicate the parental choice feature of privatization by allowing parents to select the public schools their children attend. Because all parents would have relatively equal ability to pay, either as consumers with total privatization or as taxpayers with governmental provision, comparable money might be spent on education and the money might be allocated relatively evenly among all students.

With governmental provision taxpayers without children would pick up part of the tab, and taxpayers with children might be inclined to push for public school expenditures beyond what they would be willing to pay for as consumers for privatized education. But that tendency might be counterbalanced by the reluctance of those without children to pay for a public service from which they do not benefit as much as those with children. With total privatization the education paid for by consumers with children would also benefit those without children, and some might be inclined to spend less than what the public as a whole would be willing to spend with governmental provision. But that tendency might be offset by an inclination of others to spend more on privatized education while their children are in school, due to the fact that they would have no educational expenses thereafter.

The one respect in which a privatized system might seem less likely to promote comparable educational opportunity in a relatively egalitarian society is that parents with more children or with children having special needs may not be able to afford an education comparable to what parents with fewer or less needy children could afford, whereas a government-run system might be better able to attend to the needs of those children by spreading the costs among all taxpayers. On the other hand, it may be that people in an egalitarian society would voluntarily contribute to the cost of educating children in large families or with special needs because

they believe the inherent equality of all so requires or that their parents are shouldering a disproportionate share of society's responsibility to ensure comparable educational opportunities for all children. In sum, total privatization and governmental provision might be quite comparable under egalitarian conditions.

In an inegalitarian society, on the other hand, total privatization seems less likely than governmental provision to yield comparable educational opportunity. With total privatization the well-off and better educated parents would be able to afford a higher quality education for their children than the less well-off and less well-educated, and would be better able to supplement their children's education when not in school. Some parents might be unable to afford to educate their children at all and might be incapable of self-education, thereby making compulsory education impossible to achieve. Under those conditions, a government-run system would likely yield greater comparability than total privatization by forcing the well-off to subsidize the education of the less well-off through taxation. A government-run system would not, however, guarantee total comparability. The advantages of being born into and raised by a well-educated and well-to-do family, and the disadvantages of being born into and raised by a poorly educated and less well-off family, probably cannot be overcome in all instances no matter how children are educated.²⁴ Since wealth inequalities generally translate into unequal political power, the well-off in an inegalitarian society would likely try to use their power, if they could not block a government-run system entirely, to bring about a system with built-in inequalities favorable to them. On the other hand, the less well-off might be able, through their greater numbers and if well organized, to counter the political power of the well-off and institute a government-run system providing, if not full comparability, at least substantially greater equality of educational opportunity than total privatization.

2. (5) *Total Privatization Versus (4) Government Subsidization*

Now let's contrast alternatives (5), total privatization, and (4), government subsidization of the education of children whose families cannot afford privatized education on their own. Subsidization would make compulsory education achievable under a generally privatized system, and

24. See, e.g., RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 82-84 (2001) (citing and discussing studies showing that among family influence, the economic status of one's classmates, and per pupil expenditures, the latter matters least in determining student achievement); RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 5, 9 (2004) (arguing that while educational reform can contribute to improved performance, student achievement is significantly impacted by social class characteristics whose influence "is probably so powerful that schools cannot overcome it," and suggesting "the greater importance of reforming social and economic institutions if we truly want children to emerge from school with equal potential").

would ameliorate somewhat the hierarchical educational system likely in an egalitarian society with total privatization.²⁵ But it would likely still leave a hierarchical system in place. Given the importance of education, everyone's incentive would be to provide their children with the best education they could afford. The likely result would be a tiered system of schools of varying quality and cost geared to people's means, with the well-to-do purchasing the highest quality education for their children and so on down the class hierarchy. The subsidies for those unable to afford it would likely enable them to purchase only the lowest quality education, since people paying for their own children's education would not likely be willing to enable the least well-off to provide more for their children.

3. (1) *Government-Run Public Schools Versus* (2) *The Right to Opt Out*

Now let's contrast alternatives (1), free compulsory education in a government-run system, and (2), a government-run system but with parents having the right to opt out and educate their children at their own expense. Arguable justifications for allowing opting out are that parents are entitled to guide their children's destinies until adulthood as long as they attend to their children's educational needs, that opting out enables parents more in touch with their children's needs than governmental officials to choose a more suitable setting from what the public schools provide, and that the ability to opt out encourages public school authorities to be more responsive to the needs of all children.²⁶

However, there are possible disadvantages to opting out. One is that parents may focus on their own needs more than on their children's, or may err in assessing their children's needs. In a society with parental child rearing and public schooling, conflicts will likely occur between what parents believe is best for their children and the views of public officials who also bear responsibility for children's education and whose own needs, as

25. Note the resemblance to food stamps. Only those deemed too poor to afford food receive food stamps, whereas everyone else must provide for themselves; food stamps are supposed to assure people a minimally adequate diet, while others who choose to spend their money on a more elaborate diet are free to do so. A full discussion of whether this arrangement satisfies the requirement of equitable sharing is beyond the scope of this Article. Briefly, equitable sharing certainly requires that everyone have access to a healthy diet in a society with enough food to go around. Beyond that, inequalities may be permissible on grounds of merit or encouraging productivity, as long as society accords everyone a comparable opportunity to attain a more elaborate diet. However, education at the elementary and secondary level differs from food in that unequal educational opportunity translates into unequal opportunity generally, such that children who have access to a superior education have an unfair advantage over those who don't in pursuing success in life, whereas access to an elaborate diet does not necessarily (if at all) confer a similar advantage. Merit or encouraging productivity may justify inequalities resulting from how adults choose to use the education they receive as children, but only when children have comparable educational opportunities.

26. For a discussion of Supreme Court precedent protecting and limiting parents' right to control children's education, see *supra* note 20.

with parents, may affect their decisions. In the abstract it seems impossible to say which of many possible approaches—requiring all children to attend public school, giving parents absolute discretion to opt out of public school, an administrative process in which one or the other side has the burden of proof, or governmental regulation of non-public education—is best suited to attending to children’s needs.

A second possible disadvantage is that opting out may undermine the democracy-enhancing and socializing purposes of formalized education. In opting out of public schools parents may focus more on their children’s needs than on the needs of society as a whole. Parents may put more emphasis, when the two differ, on the skills and knowledge their children need to prosper as adults than on the knowledge needed to understand and participate effectively in the democratic process. Or parents may opt for home education, thereby arguably depriving society of the benefits in promoting social harmony of children’s interacting with others outside their families and immediate environment. Again, it seems impossible to say in the abstract whether such consequences would flow from opting out. To the extent they do, government intervention may ameliorate the effects: for example, through regulating the curriculum at private or home schools, or encouraging or requiring home schooled children to participate in extracurricular activities provided for free by the government.

Third, a disadvantage particularly applicable in inegalitarian settings is that the well-off may educate their children privately so as to provide them with a better education than what the public schools offer, thereby undermining the democratic requirement of comparable educational opportunity for all. If those who opt out must still pay taxes to support public schools, the option will likely be available only or primarily to the well-off. A conceivable scenario is a dual system of schooling: higher quality privatized education for and paid for by the well-off, and lower quality public education for the less well-off paid for by taxpayers for many of whom, i.e., the well-off with children educated privately, the incentive would be to minimize the taxes they pay for a service they do not receive. Relieving those who opt out from having to pay school taxes would extend the option more broadly, although it would likely remain unavailable to the least well-off who pay minimal taxes. The consequence might be a hierarchical system of private schools of varying quality depending on ability to pay and of low quality public schools serving only the least well-off.²⁷

27. Something comparable is occurring in India. See Somini Sengupta, *Push for Education Yields Little for India’s Poor*, N.Y. TIMES, Jan. 17, 2008, at A1, available at http://www.nytimes.com/2008/01/17/world/asia/17india.html?_r=1&scp=6&sq=somini%20Sengupta&st=nyt (noting that most Indian families of means send their children to private schools, while public schools have sunk to spectacularly low quality and “have become reserves of children at the very bottom of India’s social ladder”).

4. (3) *Government-Funded Vouchers*

Finally, let's address alternative (3), a government-funded voucher system.²⁸ Under egalitarian conditions, a voucher system might yield substantially comparable educational opportunity similar to at least some versions of either a government-run or privatized system. The value of the voucher would likely resemble what people pay in taxes under a government-run system or out of their pockets under total privatization. If a government-run system not allowing opting out or allowing opting out with relief from school taxes were to shift to a voucher system, parents might use their vouchers at public or private schools similar to what their children were previously attending or to defray their prior expenditures on home education.²⁹ Likewise, if a totally privatized system were to shift to vouchers, parents might use the voucher to cover the costs of similar formalized or home education as before.

Under inequalitarian conditions, whether a voucher system would promote comparable educational opportunity depends on its design. As against a privatized system with or without government subsidization for those unable to educate their children, vouchers might ameliorate the hierarchical system likely to result from some being able to spend more than others on their children's education or from some being unable to educate their children at all. As against a public school system without opting out, vouchers might enable parents who are more attentive than school authorities to their children's needs to choose to educate them privately or at a public school other than the one to which they have been assigned. As against a public school system with opting out, and with or without relief from property taxes, vouchers might enable parents unable to afford it to opt out.

However, if the recipients of vouchers were entitled to spend more for their children's education than the amount of the voucher, then the

28. For a history and evaluation of the voucher movement, see generally BRIAN GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 1-68 (2007); THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 86-113 (2000). A possible alternative to vouchers as a way to enhance parental choice is charter schools. Charter schools are government-funded schools subject to less state control of their operations than ordinarily applicable to public schools. Some charter schools are formed by local public school authorities, in which case they resemble magnet or other special purpose schools. Others are created by private entities, in which case they resemble private schools except that attendees don't pay tuition. Other than the method of payment, vouchers and charter schools could be designed to function identically. For a history and evaluation of the charter school movement, see generally GILL ET AL., *supra*; GOOD & BRADEN, *supra*, at 114-36; Caroline M. Hoxby, *The Supply of Charter Schools*, in CHARTER SCHOOLS AGAINST THE ODDS 1 (P. Hill ed., 2006).

29. On the other hand, as compared with a government-run system with opting out but no relief from school taxes, vouchers would likely enhance the ability of those who prefer private schooling but remain in public school due to unwillingness to bear the additional expense.

well-off might do so in order to gain an advantage for their children. The incentive of the well-off would be to keep the amount of the voucher as low as possible, so as to minimize their subsidization of the less well-off and maximize their financial advantage. The result might be a system that is at best somewhat less hierarchical, but possibly more so, than with a totally privatized or government-run system.³⁰ To avoid this result, it may be necessary to prohibit schools that accept vouchers from charging more than the voucher or from favoring the well-off in their admissions process.³¹ Even so, hierarchy is likely to result, with the well-off being better able than the less well-off to supplement their children's education, and with some who can afford it declining to use their vouchers and sending their children to expensive schools not accepting vouchers and catering to the well-off.

In sum, while under egalitarian conditions a privatized, government-run, or voucher system might all produce a relatively comparable educa-

30. See, e.g., James S. Liebman, *Voice Not Choice*, 101 YALE L.J. 259, 302-08 (1991) (book review) (opposing vouchers and other school choice plans facilitating exit from the public school system for their likely contribution to a hierarchical and inequalitarian educational system, and recommending consideration of mandatory public school attendance as a way to bring about ethnic and class integration); James A. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047-48 (2002) (arguing that "unless the politics surrounding school choice are altered, school choice plans will continue to be structured in ways that protect the physical and financial independence of suburban public schools . . . [and] will lead to, at best, limited academic improvement, [and] little or no gain in racial and socio-economic integration"). Others have a more positive view of the potential benefits of vouchers. See James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 84 UCLA L. REV. 547, 579-84 (2007) (noting the uncertainty to date of the educational impact of voucher programs on minority students who receive them and those who remain in public schools, and suggesting that vouchers are a worthwhile experiment along with efforts to promote socio-economic integration of suburban schools).

31. Because charter schools receive their funding directly from the government, charging more to those who can afford more is less of a problem with such schools, although they may still have an incentive to favor high achievers in order to enhance their reputations. On the potential benefits of charter schools, see, for example, CHARTER SCHOOLS AGAINST THE ODDS, *supra* note 28, at 127-203 (containing articles on the potential benefits of charter schools); THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS (Eric Rofes & Lisa M. Stulberg eds., 2004) (providing a series of essays arguing that community-controlled charter schools geared to the needs of low-income students and students of color offer an emancipatory potential for the disadvantaged and disenfranchised); James Forman, Jr., *Do Charter Schools Threaten Public Education? Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839 (arguing that the existing data suggests that charter schools do not threaten public education, that in general charter schools have not "cream skimmed" whites and economically well-off students from public schools, and that rather than undermining support for public school funding charter schools might become allies with public schools in the pursuit of increased government expenditures for education; on the other hand, noting the need for regulation to prevent charter schools from engaging in selective admissions practices, the uncertainty of whether charter schools skim students of higher academic ability or from well educated families, and the possibility that the current focus on standardized testing might impel charter schools to cream skim).

tional opportunity for all children, none are likely to do so under egalitarian conditions, although an appropriately designed government-run or voucher system would likely be more nearly comparable than total privatization. This sets the stage to discuss the federalization of education.

IV. FEDERALIZATION AND COMPARABLE EDUCATIONAL OPPORTUNITY

By federal provision I mean provision by the highest level of government in the society, i.e., the national government. Must the national government itself be the provider, or may the responsibility be assigned to lower levels of government? The answer is that public provision may be assigned to lower levels only if the requirement of comparable educational opportunity for all children is satisfied. If not, then the national government must be the provider, at least to the extent necessary to ensure comparability.

Let's consider three models for allocating the responsibility to provide for education between the national and lower level governments: (1) total lower level provision with no national involvement and each lower level provider being totally responsible for its locale; (2) total national provision with lower levels of government having no role at all; and (3) a mixed allocation with the national government assuming some educational responsibilities and lower level governments assuming others.

In the prior section, we found that under egalitarian conditions both public and private provision of education might yield comparable educational opportunities for all children, and that in practice the various approaches might operate identically. Consequently, in a society without substantial differences among people's wealth, education, and political power, both national and lower level provision of education may comport with democratic principles. Thus, for example, a federal system of government-run public schools that all must attend might suffice; so might provision by lower levels of government, with some having public schools, others total privatization, and still others a voucher system. On the other hand, there may be reasons to favor some approaches over others. For example, that all have comparable wealth, education, and political power does not necessarily mean that everyone's educational needs are identical, and it might be that lower level governments are better able than the national government to identify their children's needs. Or if education is to be publicly financed, it may be more efficient for the national government to tax and distribute funds to lower level governments than for those governments to raise their own funds. Because it is difficult to answer such questions in the abstract, experimentation would likely be needed.

Under inequalitarian conditions, the case for federalizing at least some aspects of education in order to promote comparable opportunity becomes stronger. We found above that under inequalitarian conditions some form of public provision is required. At a minimum, then, if education is to be decentralized, the national government must prohibit lower

level governments from totally privatizing education within their jurisdictions and must ensure through appropriate regulation that they publicly provide for comparable educational opportunity for their children. This might be enough if lower level governments were comparably egalitarian as compared with each other. But if not, then the national government must assume a greater role. If there are significant wealth disparities among lower level governments, the national government must somehow ensure fiscal equality.

One approach would be for the national government to raise funds for education nationally and to distribute the money to lower level governments, so as to equalize the quality of education across the localities. This approach, however, would not likely produce comparability if lower level governments were free to supplement their federal funds with local revenues, as well-off communities would have the incentive and would be able to provide their children with a higher quality education than less well-off communities could afford. The national government might try to prevent that by prohibiting lower level governments from imposing supplementary taxes, but people in localities that are better off might counteract that move through voluntary contributions to local schools. To avoid, or at least minimize, escape hatches, the national government might have to federalize education still more, as by abolishing lower level provision of education and establishing a national public school system. While well-off parents would still be able to enhance their children's education by opting out of public school if allowed or by supplementing their education outside of school, total or substantial federalization seems the most viable way to minimize educational inequalities under egalitarian conditions with diverse lower level governments.

V. FEDERALIZING EDUCATION IN THE UNITED STATES

A. *The Inequality of Educational Opportunity in the United States*

The United States is a highly egalitarian society.³² If education were totally privatized the consequence would likely be a highly stratified

32. As of the early 2000s, the top 1% of households had about 33% of the total net worth and about 20% of the total income, the top 20% of households had 84% of the total net worth and about 59% of the total income, while the bottom 40% had less than 1% of the net worth and only about ten 10% of the income. See Edward N. Wolff, *Changes in Household Wealth in the 1980s and 1990s in the U.S.* 30 tbl.2 (Levy Econ. Inst. of Bard College, Working Paper No. 407, 2004), available at <http://www.levy.org/pubs/wp/407.pdf> (presenting statistics on the distribution of wealth and income between 1983 and 2001). These disparities have grown since the 1960s, and are at their highest level since before the Great Depression. See *id.* (showing increasing disparities over the years); see also LISA A. KEISTER, *WEALTH IN AMERICA* 58 tbl.3-2 (2000) (presenting statistics on net worth and wealth between 1962 and 1995); Edward N. Wolff, *Recent Trends in the Distribution of Household Wealth*, in *BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA* 57, 59-60 (Ray Marshall ed., 2000) (presenting statistics on wealth and income from the 1995 Survey of Consumer Trends). In addition, as of

system with a relatively small economic elite purchasing a relatively high quality education to prepare themselves and their children for the higher paying professions for which such an education is essential, with a large working class purchasing vocational education or obtaining on-the-job training to prepare themselves for lower paying manual, clerical, or service jobs requiring only a minimal or modest education, and with a rather sizable underclass of illiterate or barely literate people who work, at best, sporadically at manual jobs not requiring much, if any, education and who are mired in poverty. This would violate the principle of equitable sharing—particularly with regard to children of elementary and secondary school age. A commitment to the equal moral worth of all does not permit the quality of education children receive to depend on the class status of the families into which they are fortuitously born.

While governmental provision of elementary and secondary education is the norm in this country, and while most children attend public schools, educational opportunities are nevertheless highly unequal and these inequalities contribute to an increasingly rigid social hierarchy.³³

the early 2000s, the mean net worth of black families was only 14% of white families, while the mean family income of African Americans was only 48% of whites. See Wolff, *Changes in Household Wealth*, *supra*, at 35 tbl.7. Hispanics faced comparable disparities, with family net worth of only 17% and family income of only 50% of whites. See *id.* at 36 tbl.8. At the bottom of the class hierarchy a substantial segment of the population, among whom African Americans and Hispanics are disproportionately represented, lives in poverty. As of 2005, almost 13% of the population fell below the official poverty line; for non-Hispanic whites, the poverty rate was about 8%, for African Americans about 25%, and for Hispanics about 22%. See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 46 tbl.B-1 (2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf> (showing poverty status of people by family relationship, race, and Hispanic origin). After falling substantially from more than 22% in 1959 to about 12% in 1972, the poverty rate has leveled off over the past thirty years. See *id.* (noting that in 2005 the poverty rate was at 12.6%).

33. While analysts disagree over the extent of intra and intergenerational mobility, there are indications that the ability to climb the class hierarchy has diminished over time and that economic inequality has become increasingly entrenched. See, e.g., KEISTER, *supra* note 32, at 79 tbls.3-7, 233-58 (concluding, per simulation modeling between 1975 and 1995, that the importance of education for upward mobility has increased over time, that college graduates have considerably higher odds of upward mobility, and that the odds of moving into the top 10% have been substantially greater for whites than non-whites); Eileen Appelbaum et al., *Low-Wage America: An Overview*, in LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE 1-29 (Eileen Appelbaum et al. eds., 2003) (presenting a series of studies analyzing the increasing inequality and decreasing mobility in the United States due to globalization, technology, deregulation, changes in financial markets, and the decline in labor unions); Julia B. Isaacs, *Economic Mobility of Black and White Families*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 71, 77 (Julia B. Isaacs et al. eds., 2007), available at http://www.economicmobility.org/assets/pdfs/PEW_EMP_GETTING_AHEAD_FULL.pdf (finding that “white children have substantially more upward mobility than black children of comparable incomes”); Julia B. Isaacs, *Economic Mobility of Families Across Generations*, in GETTING AHEAD OR LOSING GROUND: ECONOMIC

One factor contributing to unequal educational opportunity is the private school option. As a result of *Pierce v. Society of Sisters*,³⁴ parents are constitutionally entitled to place their children in private school.³⁵ About thirteen percent of students attend private school,³⁶ with the option being more readily available to the well-off who can afford the tuition, and this seemingly contributes to class and racial separation.³⁷ Although there is some debate whether private schools enhance educational performance,³⁸ par-

MOBILITY IN AMERICA, *supra*, at 15, 19 (concluding, based on comparison of children's incomes between 1995 and 2005 with parents' incomes between 1967 and 1971, that "[a]ll Americans do not have an equal shot at getting ahead, and one's chances are largely dependent on one's parents' economic position"); Daniel P. McMurrer & Isabel V. Sawhill, *The Effects of Economic Growth and Inequality on Opportunity*, in BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA 64 (Ray Marshall ed., 2000) (concluding that, while there is "considerable" intra and intergenerational mobility in the U.S., "[t]he period since the early 1970s has been marked by a decline in opportunity for many, especially young men without college degrees").

34. 268 U.S. 510 (1925).

35. *See id.* at 536 (protecting parents' right to educate children outside of public schools subject to reasonable state regulation).

36. As of 2005, 12.8% of all students attended private schools. *See* U.S. CENSUS BUREAU, ENROLLMENT BELOW COLLEGE FOR PEOPLE 3-24 YEARS OLD, BY CONTROL OF SCHOOL, SEX, METROPOLITAN STATUS, RACE, HISPANIC ORIGIN: OCTOBER 2005, at tbls.5-1 & 5-3 (2008), *available at* <http://www.census.gov/population/www/socdemo/school/cps2005.html>. In addition, about 2.2% of all students are homeschooled. *See* NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., HOMESCHOOLING IN THE UNITED STATES: 2003, at tbl.2 (2006), *available at* http://nces.ed.gov/pubs2006/homeschool/TableDisplay.asp?TablePath=TablesHTML/table_2.asp.

37. *See, e.g.*, CHARLES T. CLOTFELTER, *AFTER Brown: The Rise and Retreat of School Desegregation* 123, 100-25 (2004) (finding that "private schools do appear to have contributed to racial segregation in K-12 schools, though their contribution is significantly less than that attributable to racial disparities among school districts"); Robert W. Fairlie, *Racial Segregation and the Private/Public School Choice*, RESEARCH PAPER SERIES (Teachers Coll., Columbia Univ., New York, N.Y.), Feb. 2006, *available at* http://www.ncspe.org/publications_files/OP124.pdf (finding that blacks and Hispanics are substantially underrepresented in private schools, that whites and Hispanics enroll in private school in response to high concentrations of black students in public schools, and that family income is directly related to and a major determinant of who attends private school); Eric J. Isenberg, *The Choice of Public, Private, or Home Schooling* 14-19 (2006), *available at* <http://client.norc.org/jole/SOLEweb/7338.pdf> (finding that the poor quality of public schools is a significant factor motivating parents to choose private schools especially for the well educated, and that families living inside metropolitan areas and in locales with greater income heterogeneity are more likely to choose private schools).

38. *See, e.g.*, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., COMPARING PRIVATE SCHOOLS AND PUBLIC SCHOOLS USING HIERARCHICAL LINEAR MODELING (2006), *available at* <http://nces.ed.gov/nationsreportcard/pdf/studies/2006461.pdf> (concluding, based on 2003 National Assessment of Educational Progress exams in math and reading for fourth and eighth grades and after adjusting for student and school characteristics, that private and public school students performed comparably in math at the eighth grade level and reading at the fourth grade level areas, that private schoolers outperformed public schoolers in reading at the eighth grade level, and that public schoolers outperformed private schoolers in math at the fourth grade level); Paul E. Peterson & Elena Llaudet, On

ents opting for private schools evidently believe they are more suited to their children's needs and the more prestigious universities disproportionately admit graduates of the elite private schools.³⁹

A second, and greater, factor contributing to unequal educational opportunity is the structure of public education. The primary responsibility for providing education rests with state and local governments.⁴⁰ Most state constitutions obligate the state to have a system of free public schools, and most states have delegated a large share of the responsibility to cities and independent school districts. The rationale is that shared responsibility serves the dual needs of uniformity and diversity. State regulation and oversight of local school systems ensures instruction from qualified teachers in material that all children should be exposed to, while local

the Public-Private School Achievement Debate (Aug. 2006) (paper prepared for annual meeting of Am. Political Sci. Ass'n), *available at* <http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG06-02-PetersonLludet.pdf> (concluding that NCES study was methodologically flawed and that with better measures of student and school characteristics private school students consistently outperformed public school students). With regard to voucher and charter schools, some studies indicate and the prevailing sentiment seems to be that, when controlled for race and class, the performance of children in voucher and charter schools does not differ much and may be somewhat lower than that of public school students. *See, e.g.*, CHARTER SCHOOL OUTCOMES 163-281 (M. Berends et al. eds., 2008) (providing studies of the impact of charter schools in California, North Carolina, and Idaho); GILL ET AL., *supra* note 28, at 79-125 (discussing various studies on the impact of vouchers and charter schools on the academic achievement of those attending and on those remaining in traditional public schools); GOOD & BRADEN, *supra* note 28, at 137-87 (discussing studies of educational achievement in charter versus traditional public schools); National Center for the Study of Privatization in Education, <http://www.ncspe.org/list-papers.php> (last visited Apr. 7, 2010) (providing a series of studies on the impact of charter and voucher schools).

39. For example, as of 2008, between 24%-45% of the graduates of the fifteen top-ranked private day schools, and between 15%-34% of the graduates of the fifteen top-ranked private boarding schools, attended in the prior five years the Ivy League, MIT, or Stanford. *See* PrepReview.com, America's Top College Preparatory Boarding Schools (2009), http://www.prepreview.com/rankings/us/boarding_schools.php (providing private boarding school rankings); PrepReview.com, America's Top College Preparatory Private Day Schools (2009), http://www.prepreview.com/rankings/us/private_schools.php (providing private day school rankings); *see also* PETER W. COOKSON, JR. & CAROLINE HODGES PERSELL, PREPARING FOR POWER: AMERICA'S ELITE BOARDING SCHOOLS 167-89, 171, 184-85 (1985) (discussing the historic connection between the elite private schools and the Ivy League and other elite colleges and universities; noting that about 20% of boarding school students attend the Ivy League and that as late as 1982 34% of Harvard freshmen and 40% at Yale and Princeton were private school graduates; and noting that public school students with similar credentials and backgrounds as prep school students are accepted at less selective institutions).

40. *See, e.g.*, ROBERT J. FRANCIOSI, THE RISE AND FALL OF AMERICAN PUBLIC SCHOOLS 143-67 (2004) (describing public education in the United States as primarily local in character at its inception, the push for state centralization in the first hundred years, and the increased level of state and federal involvement since the mid-twentieth century); JOHN D. PULLIAM & JAMES J. VAN PATTEN, HISTORY OF EDUCATION IN AMERICA 202-09 (8th ed. 2003) (describing the present structure of public education).

control through locally elected officials makes school authorities more accessible and ensures greater responsiveness to the diversity of needs and interests among students and locales. This arrangement has arguable merit in promoting comparable educational opportunities for all children.⁴¹

However, state and local governments also share the primary responsibility for funding education. Nationwide about ninety percent of public schools' finances come from state and local governments, with the state and local shares being roughly equal, although varying somewhat from state to state.⁴² State and local financing produces substantial inequalities in per pupil educational expenditures. Because local governments' tax bases differ widely within states, so does their ability to raise money to fund education. As a result, the richer school districts in which well-off children tend to live generally spend more money on education and provide a higher quality education than the poorer districts where the less well-off live.⁴³ Similar inequalities exist among the states. Per pupil expenditures differ substantially among them, and in general the more well-off states provide a higher quality education than the less well-off.⁴⁴ In the inegal-

41. See, e.g., GUTMANN, *supra* note 12, at 73-74 (advocating shared educational responsibility among levels of government as a means "to preserve local democratic control over schools within limits set by the aims of cultivating a common culture and teaching essential democratic values, limits that might be better safeguarded by higher levels of government").

42. See NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, at tbls.171 & 172 (2008), available at http://nces.ed.gov/programs/digest/d08/tables/dt08_171.asp (tbl.171) (providing data on source of funds for public schools), http://nces.ed.gov/programs/digest/d08/tables/dt08_172.asp (tbl.172) (same).

43. See, e.g., CARMEN G. ARROYO, THE FUNDING GAP 6-7 tbls.5 & 6 (2008), available at http://www.nvasb.org/Publications/Research_Data/the_funding_gap.pdf (finding that, as of 2005, on average, high-poverty districts received \$938 less per pupil than low-poverty districts and that high-minority districts received \$877 less than low-minority districts); BRUCE J. BIDDLE & DAVID C. BERLINER, WHAT RESEARCH SAYS ABOUT UNEQUAL FUNDING FOR SCHOOLS IN AMERICA (2003), available at http://www.wested.org/online_pubs/pp-03-01.pdf (documenting large funding differences between wealthy and impoverished communities, and attributing the gaps to the heavy reliance on local property taxes).

44. In 2005-06, the average elementary and secondary school per pupil expenditure in the United States was \$9,154, ranging from a high of \$14,954 in New Jersey to a low of \$5,464 in Utah. See NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, at tbl.184 (2008), available at http://nces.ed.gov/programs/digest/d08/tables/dt08_184.asp; see also Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 32, 37-63 (R. Kahlenberg ed., 2000) (documenting as of the late 1990s that poorer states with higher levels of poverty spend less on education than richer states with lower levels of poverty, and concluding that differences in per pupil expenditure between states "are a greater cause of disadvantaged students falling behind their counterparts than any other school resource inequality" and that existing federal aid programs do little to ameliorate and in some instances exacerbate the inequalities, and calling for increased and redirected federal spending); James P. Pinkerton, *A Grand Compromise: Saving American Education*

itarian context of the United States, state and local financing of public education does not comport with the requirement of equitable sharing.⁴⁵

A related structural factor is that due to the demographic differences among local governments, public education in the United States is significantly segregated along class and race lines.⁴⁶ A common pattern is a poorer, predominantly working-class, and disproportionately minority, in-

Requires Ending the Reliance on Public Schools on Local Property-Tax Bases, ATLANTIC MONTHLY, Jan./Feb. 2003, at 115, 115-16 (reporting on a study of National Association of Educational Progress test results in thirty states showing that nine of the eleven states spending more than the national per pupil average had average or better test results, while twelve of the nineteen states spending less than the national average had less than average results).

45. *But see* Edward B. Foley, Rodriguez *Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 479 (1998) (arguing that a “principle of intrinsic equality” underlies the Equal Protection Clause and “guarantees all children of normal intelligence the opportunity to receive an education that prepares them for the rights and responsibilities of adult citizenship in a democratic society,” but that “as long as all children receive a certain minimum level of educational opportunity, the fact that some children receive better opportunities does not necessarily violate the principle of intrinsic equality . . . even if the educational inequalities are caused by inequalities in the taxable wealth of the local communities in which these children reside,” and that the principle of intrinsic equality is satisfied by requiring states to provide all children the opportunity to attain a high school level education). From my perspective, the problem with Foley’s approach is that there is no such thing as a high school level education in the abstract and that what a high school level education consists of depends on the context. If some receive education X, then that is their level; if others receive X+Y, then that is their level. To require in the egalitarian context of the United States that all children have access to X, while allowing others who can afford it to receive X+Y, is to institutionalize differential levels of high school education along class lines, to prepare the more well-off for the rights and responsibilities of adult citizenship better than the less well-off, and to advantage the more well-off in achieving success in social life as adults. This is inconsistent with what Foley calls intrinsic equality and what I call inherently equal moral worth. Either one, in my view, requires a comparable educational opportunity for all children.

46. *See, e.g.*, GARY ORFIELD & CHUNGMEI LEE, UCLA CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007) [hereinafter ORFIELD & LEE, INTEGRATION STRATEGIES], available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (documenting the decreasing percentage of whites and the increasing percentage of poor children in public schools, increasing racial segregation since the early 1980s following a period of increased integration beginning in the early 1960s, the high incidence of segregation for all racial groups except Asians and with whites being the most segregated, the confluence of segregation by race and poverty with the average black and Latino attending a school more than half poor, and the general inferiority of minority schools); GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACIAL TRANSFORMATION AND THE NATURE OF SEGREGATION (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (documenting between 1991-92 and 2003-04 the increased incidence of minorities attending public schools predominantly (50% or more) and substantially (90% or more) of their own ethnicity, as well as the high incidence of segregation by race and poverty combined, while also noting the emergence of substantial numbers of multiracial schools due to the increasingly minority composition of public school students overall).

ner-city school district surrounded by mostly well-off and predominantly white suburban districts. Inner-city schools generally provide an inferior education as compared to suburban schools,⁴⁷ and many educators believe racial and class integration is needed to equalize educational opportunities.⁴⁸ If so, the failure to take reasonably available steps to bring about greater integration violates the duty to provide comparable educational opportunity.

Some aspects of today's unequal education could be addressed on the state level. If states would redraw local school district boundaries to be more racially and class inclusive, that might reduce performance gaps. If states would shoulder the full cost of public education, that could redress the inequalities of the present reliance on local financing. Without federal financing, however, the inequalities among the states will persist. So at a minimum federalizing public education seems necessary to address those educational inequalities, like school financing, that are beyond state but are within federal control. Federalization might be better suited, as well, to address some matters within state control for reasons of efficiency or due to political factors that impede reforms more so at the state than at the federal level. But with or without federalization, the advantage to the

47. See, e.g., GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005), available at http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf (citing data and studies showing a strong relationship between racial segregation with high concentrations of poverty and educational inequalities in terms of teacher quality, test scores, and drop out rates); John A. Powell, An "Integrated" Theory of Integrated Education 5-9 (Aug. 30, 2002) (unpublished manuscript, on file with UCLA Civil Rights Project), available at <http://www.civilrightsproject.ucla.edu/research/reseg02/powell.pdf> (discussing the educational harms of segregation and concentrated poverty).

48. See, e.g., RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 23-37, 116-35 (2001) (citing and discussing studies showing the educational benefits of socio-economic integration to all students, advocating a system of "controlled choice" under which parents select the schools their children will attend and selections are honored so as to foster integration defined as a school in which a majority of students are middle class, and opining that through controlled choice most school districts could achieve integration within existing boundaries); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004) (arguing, on the basis of studies showing its benefits, that economic integration of schools offers the most promising way to achieve *Brown's* goal of equal educational opportunity for all children); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TCHRS. C. REC. 1999, 2020 (2005), available at [http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger%20&%20Palardy-Does%20segregation%20still%20matter%20\(TCR%202005\).pdf](http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger%20&%20Palardy-Does%20segregation%20still%20matter%20(TCR%202005).pdf) (concluding, based on analysis of National Education Longitudinal Survey data, that "all students, whatever their race, social class, or academic background, who attended high schools with other students from high social class backgrounds learned more, on average, than students who attended high schools with other students from low social class backgrounds," and that these results were largely attributable to higher teacher expectations, greater academic rigor, and feelings of safety in schools of higher socio-economic status).

well-off of the right to opt for private schooling, which I assume will continue due to its perceived centrality to parental child-rearing, will remain.⁴⁹ And the educational advantage of being born into a well-off and well-educated family will likely continue for as long as the society's class hierarchy and parental child rearing endure.⁵⁰

B. *The Inadequacy of the Current Federal Role*

Recognizing the inability to assure all children a comparable education absent even more fundamental systemic reform than the federalization of education, a sketch of the role the federal government currently plays in the provision of elementary and secondary education is instructive in assessing what its role should be. The federal involvement began to increase substantially with the enactment of the Elementary and Secondary Education Act of 1965.⁵¹ The federal government now provides about ten percent of the funds for public education in the United States.⁵² Although most of this money is intended to benefit lower income and

49. Tax credits for private school tuition would equalize somewhat the opportunity to opt out for parents able to afford it. On the movement for tax credits, see, for example, ANDREW COULSON, FORGING CONSENSUS: CAN THE SCHOOL CHOICE COMMUNITY COME TOGETHER ON AN EXPLICIT GOAL AND A PLAN FOR ACHIEVING IT? 69 (2004), *available at* <http://www.mackinac.org/archives/2004/s2004-01.pdf> (arguing for "an education market driven by the unfettered choices of parents, in which both for-profit and non-profit schools compete freely and vigorously to attract and retain students" and that "[a] Universal Education Tax Credit program is the ideal vehicle for instantiating an effective education market"). However, the impact of tax credits might be to exacerbate overall educational inequalities—if, for example, large numbers of better off people take advantage of tax credits, leaving public schools mostly to those unable to afford private school tuition and with reduced funding due to the reluctance of private schoolers to continue to support public schools. Whether the private school option as practiced today, i.e., with no relief from school taxes, has drained money from public schools seems not to have been widely studied. One study of New York state school districts (not including New York City) between 1983-93 concluded that enrollment in private schools does not cause a significant loss in taxpayer support of public schools. See Don Goldhaber, *An Endogenous Model of Public School Expenditures and Private School Enrollment*, 46 J. URBAN ECON. 106 (1999) (discussing the relationship between private school enrollment and per pupil expenditure in public schools). Since a relatively small percentage of parents currently opt out of public schools, they may lack the political power to affect public school funding. That might change if tax credits enable larger numbers to opt out.

50. See, e.g., KAHLBERG, *supra* note 24 (discussing studies showing the influence of family and the economic status of one's peers on academic achievement); ROTHSTEIN, *supra* note 24 (arguing that the impact of social class on academic achievement can probably not be fully overcome).

51. See 20 U.S.C. § 6301 (2006) (providing current statement of legislative purpose).

52. See NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, at tbl.171 (2008), *available at* http://nces.ed.gov/programs/digest/d08/tables/dt08_171.asp (summarizing data on sources of school funding).

disadvantaged children,⁵³ the effectiveness of the federal effort in improving and equalizing educational opportunities has been questioned.⁵⁴ In addition, a series of statutes promote equal educational opportunity in other respects, including requirements that states and localities receiving federal money not discriminate on the basis of race, gender, national origin, or handicapped status, and that they act affirmatively to respond to the educational needs of those groups.⁵⁵ While often quibbling about the details, most commentators believe these measures have contributed significantly to the equalization of educational opportunities.⁵⁶ Nevertheless, they have left in place the generally inegalitarian system noted above.

53. See NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, at tbl.375 (2008), *available at* http://nces.ed.gov/programs/digest/d08/tables/dt08_375.asp (noting that of the \$72.8 billion budgeted in 2008 for elementary and secondary education, \$55.5 billion was allocated to five programs benefiting lower income and disadvantaged children: Education for the disadvantaged, School improvement, Special education, Child nutrition, and Head Start); see also CARL L. BANKSTON & STEPHEN J. CALDAS, PUBLIC EDUCATION—AMERICA'S CIVIL RELIGION: A SOCIAL HISTORY 115-22 (2009) (discussing the adoption in the 1960s as part of the War on Poverty of the Elementary and Secondary Education Act of 1965 (ESEA), Project Head Start, and the Free and Reduced Price federal lunch program); JULIE ROY JEFFREY, EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (1978) (assessing history of ESEA's enactment and implementation); Thomas W. Payzant & Jessica Levin, *Improving America's Schools for Children in Greatest Need*, in NATIONAL ISSUES IN EDUCATION: ELEMENTARY AND SECONDARY EDUCATION ACT 55 (J. Jennings ed., 1995) (discussing the Improving America's Schools Act of 1994, which amended ESEA to support state initiatives to promote high standards for all students while preserving its emphasis on the poor and disadvantaged).

54. See, e.g., Adam R. Nelson, *The Federal Role in American Education: A Historical Essay*, in RETHINKING THE HISTORY OF AMERICAN EDUCATION 261, 272 (W. Reese & J. Rury eds., 2008) (concluding, based on a survey of the literature, that "the impression persists that large-scale grants-in-aid have not dramatically improved the quality (or the *equality*) of the nation's schools"); Rothstein, *supra* note 44 (arguing as of the late 1990s that federal aid programs do little to ameliorate and in some instances exacerbate educational inequalities).

55. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race or national origin in federally funded programs. See 42 U.S.C. § 2000(d). Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in educational programs receiving federal funds. See 20 U.S.C. § 1681. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination in federally funded programs against an "otherwise qualified individual . . . solely by reason of her or his disability." 29 U.S.C. § 794. The Equal Education Opportunity Act of 1974 requires "appropriate action to overcome language barriers that impede equal participation" in educational programs. 20 U.S.C. § 1703(f). The Education for All Handicapped Children Act of 1975 (now titled the Individuals with Disabilities in Education Act) requires "free appropriate education" and "full educational opportunity" for children with disabilities and an "individualized education program" geared to the "unique needs" of each child. *Id.* §§ 1412(1), 1412(2), 1414(d).

56. See, e.g., Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals With Disabilities Education Act*, 69 Mo. L. Rev. 441, 443, 450-51 (2004) (noting that "for most children eligibility means the difference between receiving essential 'special education and related services' at public expense or nothing at all," while arguing that eligibility criteria have not been adequately delineated,

The most recent federal intervention in education is the No Child Left Behind Act of 2001 (NCLB).⁵⁷ NCLB represents the federal government's most intensive effort to date to impact the overall quality of education.⁵⁸ Its stated goal is to ensure that all students achieve proficiency in the core academic skills of reading and mathematics.⁵⁹ Toward that end, states receiving federal money must adopt proficiency standards to be achieved by 2014, and must demonstrate through standardized testing annual progress in meeting those standards, and in particular, in narrowing the performance gap of poor and minority students.⁶⁰ States failing to make adequate annual progress are initially to receive additional federal aid to be targeted toward that end, and with continuing failure face sanctions including requirements that inadequate teachers be replaced, stu-

leading "to the disastrous results of both over-identification and under-identification of IDEA eligible children" and recommending "a clear roadmap to IDEA's eligibility criteria and the tools to make correct eligibility decisions"); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 361-62 (2005) (generally approving the so-called Castenada test requiring "English language assistance programs for ELLs to be based on a sound educational theory supported by some qualified experts" as a means to assure compliance with the Equal Educational Opportunity Act of 1974's mandate that states take "appropriate action to overcome language barriers that impede equal participation by its students," while arguing that recent judicial applications of the test have undermined the Act's purpose by insufficiently scrutinizing school authorities' assertions of soundness and consequently upholding "language support programs as 'appropriate action' that likely are ineffective, and possibly harmful, to the English language development of English language learners"); Catherine Pieronek, *Title IX and Gender Equity in Science, Technology, Engineering and Mathematics Education: No Longer an Overlooked Application of the Law*, 31 J.C. & U.L. 291, 308 (2005) (acknowledging the contributions of Title IX of the Education Amendments of 1972 to the growth of women's athletics over the past thirty years, while suggesting that the enforcement scheme governing athletics "has little utility for the academic context" and noting that women remain underrepresented in particular in the STEM fields, and recommending that compliance efforts focus more heavily on institutional policies and practices negatively impacting women's choices to pursue those fields and especially that educational institutions engage in active self-assessment).

57. Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. §§ 6301-7941).

58. See Jack Jennings, *From the White House to the Schoolhouse: Greater Demands and New Rules*, in AMERICAN EDUCATIONAL GOVERNANCE ON TRIAL: CHANGES AND CHALLENGES 291 (W. Boyd & D. Miretsky eds., 2003) (discussing the goals and workings of No Child Left Behind and prior federal efforts to impact the quality of education).

59. See Erin Kucerik, *The No Child Left Behind Act of 2001: Will It Live Up To Its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 480 (2002) (citing initial press release by Department of Education regarding goals of NCLB). See generally No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. §§ 6301-7941).

60. See Kucerik, *supra* note 59, at 480-81 (outlining specific requirements of NCLB).

dents be allowed to transfer to higher performing schools, and failing schools be closed.⁶¹

While some have praised NCLB as contributing at least potentially to improving educational opportunity,⁶² others have criticized it as ill-designed and unlikely to be effective.⁶³ Principal criticisms are that it provides insufficient funding to enable states and localities to meet its goal;⁶⁴ that it fails to establish meaningful standards for evaluating student performance;⁶⁵ that it encourages states, in order to avoid sanctions, to set inadequate standards and to induce poorly performing students to drop

61. See *id.* at 481 (discussing consequences for schools failing to comply with NCLB standards).

62. See CTR. ON EDUC. POL'Y, IS THE EMPHASIS ON "PROFICIENCY" SHORTCHANGING HIGHER- AND LOWER-ACHIEVING STUDENTS? 2 (2009), available at <http://www.cep-dc.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=280&documentFormatId=4382> (concluding that student achievement in reading and math has generally improved since 2002, that the greatest gains have been at the proficient-and-above level with lesser gains at the basic and advanced levels, and that "there is no strong evidence that NCLB's focus on proficiency is shortchanging students at the advanced or basic levels"); Diane Ravitch & John E. Chubb, *The Future of No Child Left Behind*, EDUC. NEXT, Summer 2009, at 49, available at <http://educationnext.org/the-future-of-no-child-left-behind> (presenting a dialogue in which Chubb argues that NCLB should be retained because it "is based on sound principles and should with time improve the achievement of all American children, especially economically disadvantaged and racial minorities" and because "[t]here is empirical evidence these principles are working," while acknowledging that NCLB has some flaws and recommending adjustments).

63. See, e.g., JAEKYUNG LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS (2006), available at http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf (concluding, based on analysis of National Assessment Educational Program data, that NCLB has not significantly contributed to improving educational achievement nor to closing the achievement gap between whites and disadvantaged minorities); Ravitch & Chubb, *supra* note 62 (presenting dialogue in which Ravitch argues that NCLB should be scrapped because it "has produced meager gains in achievement" and "there is no reason to believe that the results . . . will get dramatically better").

64. See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006) (discussing the wisdom of unfunded federal coercion, and concluding that while NCLB is not unconstitutionally coercive it is coercive from a policy perspective); L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239 (2006) (arguing that NCLB is unconstitutional as an unfunded federal mandate).

65. See Richard Rothstein et al., "Proficiency for All"—An Oxymoron 2, 3, 55 (Nov. 14, 2006) (paper prepared for symposium at Teachers College, Columbia University), available at http://epi.3cdn.net/be01cf04e4b5391ec1_2qm6i6vlc.pdf (arguing that the "proficiency for all" goal of NCLB is conceptually flawed because "no goal can simultaneously be challenging to all and achievable by all students across the entire achievement distribution"; and recommending instead, as a means of setting "strenuous but realistic goals for improved academic achievement by students at all points in the distribution," an approach that "would expect students in each demographic group to perform at a higher level than they presently do, by establishing benchmarks based on what demographically similar students, in best practice conditions, actually do achieve").

out of school;⁶⁶ that it promotes rote learning to enable students to pass standardized tests at the expense of teaching them to reason and think critically;⁶⁷ and that it is a Trojan Horse designed to undermine public education and foster privatization.⁶⁸ However, even if successful, NCLB will leave much of the inequality of the existing system in place. At a minimum, full federal funding seems essential to providing a comparable education for all students. Even if all students meet adequate minimum performance standards, funding inequalities will likely persist and result in superior educational opportunities for those living in more well-off states and localities.

Moreover, that federal intervention has historically been needed over the past forty-five years or so to induce states to redress unequal opportunity in various aspects of education, suggests that the political process at the federal level may in general be better suited than at the state level to bring about more nearly comparable opportunity. Comparable opportunity requires that the well-off subsidize the education of the less well-off,

66. See, e.g., Gershon M. (Gary) Ratner, *Why The No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1 (2007) (criticizing NCLB for inducing states to lower academic standards and failing to promote systemic reform, and recommending changes to make it more effective); James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (criticizing NCLB for encouraging lower academic standards, deterring quality teachers, and promoting the segregation and pushing out of poor and minority students, and recommending changes to avoid these defects).

67. See, e.g., M. GAIL JONES ET AL., *THE UNINTENDED CONSEQUENCES OF HIGH-STAKES TESTING* 1-77 (2003) (critiquing the trend toward high-stakes standardized testing, likely to intensify with NCLB, as overly emphasizing basic skills in literacy and math at the expense of other areas of the curriculum integral to students' overall development, and as promoting rote memorization at the expense of fostering "students' thinking skills, such as problem solving and critical thinking, to allow them to use their knowledge and skills in real-world contexts"); Jane Hanaway & Laura Hamilton, *Performance-Based Accountability Policies: Implications for School and Classroom Practice*, RESEARCH REPORT (Urban Inst., Wash., D.C.), Oct. 16, 2009, at 20-23, http://www.urban.org/UploadedPDF/411779_accountability_policies.pdf (discussing the incentive to emphasize skills that artificially inflate test scores without increasing underlying skills and knowledge, while noting that there is not necessarily a clear-cut distinction between the two).

68. See, e.g., Stephen Thompson, *Public Education and Privatization in the Ownership Society*, in *THE MYTH AND REALITY OF NO CHILD LEFT BEHIND* 89, 90, 99 (T. Price & E. Peterson eds., 2009) (noting critiques of NCLB "as a not very well-disguised effort to shift public education funding to the private sector," situating NCLB's privatization push in the context of efforts to privatize other public programs like Social Security and Medicare, and arguing that, while school choice has potential benefits for disadvantaged children in bad public schools, "[i]f the object is obedience to an ideology of unfettered free markets and unchecked privatization then initiatives like choice will serve as nothing more than a way to shift public funds to private entities without any public oversight"); Gerald W. Bracey, *The Seven Deadly Absurdities of No Child Left Behind*, NOCHILDLEFT.COM, Oct. 2004, <http://nochildleft.com/2004/oct04absurd.html> (contending that NCLB "aims to increase the use of vouchers, increase the privatization of public schools, reduce the size of the public sector, and weaken or destroy the teachers unions").

and that those whose children do not have costly special needs subsidize the education of children who do. The federal government seems the appropriate level to undertake redistributive measures for two reasons: first, the progressivity of the federal tax system, as against the regressivity of the sales and property taxes on which states and localities heavily rely;⁶⁹ and, second, the ability of the well-off and of business interests to thwart redistribution more persuasively by threatening to leave a state than to depart the country.⁷⁰ In addition, lack of comparable educational opportunity primarily prejudices disadvantaged people who also lack comparable political power due to poverty or historical discrimination or being relatively few in number. Reforms of the magnitude required to approach comparable educational opportunity will likely require a massive reform movement instigated by coalitions among the disadvantaged and less pow-

69. See ROBERT S. MCINTYRE ET AL., INST. ON TAXATION AND ECON. POL'Y, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES (2d ed. 2003), available at <http://www.itepnet.org/wp2000/text.pdf> (finding as of the early 2000s that, due to the heavy reliance on the somewhat regressive property tax and highly regressive sales tax, most state tax systems were regressive and that changes in local and state taxes over the prior decade had made them even more regressive); JEFFREY ROHALY, TAX POL'Y CTR., URBAN INST. & BROOKINGS INST., THE DISTRIBUTION OF FEDERAL TAXES, 2008-11, at 1, available at http://www.taxpolicycenter.org/UploadedPDF/1001189_federal_taxes.pdf ("Overall, the federal tax system is highly progressive. On average, households with higher incomes pay taxes that are a larger share of their income. The tax cuts passed since 2001 have reduced the overall progressivity of the federal tax system with the notable exception of the stimulus package passed in early 2008. The tax rebates in the stimulus legislation are in effect for 2008 only, however, and so the progressivity of the tax system will decline markedly in 2009 and 2010 as effective tax rates rise substantially for lower and moderate-income households. At the same time, effective rates will fall for high-income households as the repeal of the limitations on itemized deductions and personal exemptions and the complete repeal of the estate tax become fully phased in. Finally, almost all provisions of the 2001-06 tax cuts are set to expire at the end of 2010. Barring legislative action, effective tax rates will therefore rise across the income spectrum in 2011. The largest increases will be in the upper income classes and so the tax system will become more progressive in 2011 unless the tax cuts are made permanent."); Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSPECTIVES 3, 22 (2007), available at <http://elsa.berkeley.edu/~saez/piketty-saezEP07taxprog.pdf> (finding that due to declines in the corporate, estate, and gift tax rates "the progressivity of the U.S. federal tax system at the top of the income distribution has declined dramatically since the 1960s").

70. See, e.g., Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1393-94 (2004) ("As has long been recognized in the literature on fiscal federalism, subnational governments are constrained in their ability to impose redistributive taxes because taxpayers may simply choose to leave the jurisdiction to avoid the tax. . . . In effect, by threat of exit, mobile taxpayers can demand price-like 'benefit taxes' and thereby avoid becoming the subjects of state or local efforts to redistribute income. One normative prescription flowing from this analysis is that, in a federal system of governments, redistributive policies should be undertaken exclusively by the most central level of government.").

erful.⁷¹ Such coalitions seem more likely to be effective at the federal level where greater numbers can be brought to bear and more attention shone on the needed changes.

C. *The Need for Greater Federal Intervention*

Under the inequalitarian conditions prevailing in this society, the requirements of equitable sharing and comparable educational opportunity demand a greater federal role than to date. Let's consider three possible forms the federalization of education could take. I assume for the time being that the federal government will not institute a nation-wide voucher system, and that most children will continue to attend traditional public schools or government-funded charter schools. The three models, with federal intervention at its least in the first model and increasing thereafter, are: (1) full federal financing of the existing state and local system; (2) the federal takeover of the states' primary role in superintending a decentralized system of public schools that are federally funded but of which locally elected governments and officials are responsible for day-to-day management pursuant to federal standards; and (3) the total federalization of public education with schools being financed by the federal government and run by a federal agency based in Washington, D.C.

1. (1) *Full Federal Financing*

One means of federal financing is through block grants, with the federal government providing funds to states to be spent only on education but with no other strings attached, and with states being responsible for disbursing the funds to local education agencies. This approach would work only if the federal money were used to institute comparable educational programs within and among the states. This seems unlikely without additional federal control.⁷² Within states, the political power of the well-off might tilt the distribution of federal money in their favor. Even if the money were distributed in an evenhanded way, it seems likely that well-off states and localities would, as they now do, choose to raise additional funds to enhance the quality of their children's education beyond what the less well-off states and localities could afford.

71. See, e.g., Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 207, 238-53 (2009) (arguing that a mass movement of working class people of all ethnicities is necessary to achieve social and racial justice in the United States).

72. See, e.g., Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297 (1996) (discussing the merits and demerits as an approach to federal financing of block grants containing minimal federal strings and designed to move governmental accountability closer to the people and to promote greater flexibility and responsiveness in program design, as against categorical grants and entitlement programs containing programmatic requirements designed to ensure that federal goals are met and program beneficiaries are served).

Federal strings requiring an evenhanded distribution of the funds and forbidding supplementation might prevent these deviations. However, states and localities would still have the right to decline federal money and operate free from federal control. Whether any would do so in order to avoid federal strings is hard to say. Because state residents would still have to pay federal taxes for education, there would be an incentive to accept the money. On the other hand, if evenhandedly distributed federal money were less than what individual states or localities were previously spending, some might forego it in order to provide their children the advantage of a superior education. If not, and if states and localities are better suited than the federal government to administer public education due to the arguable advantages of state and local control in responding to children's diverse needs, then block grants with strings requiring evenhanded distribution and prohibiting supplementation might advance the goal of comparable educational opportunity.

2. (2) *Federal Takeover of the States' Role*

The federal takeover of the states' current role in superintending public education would effectively make local school districts agencies of the federal government, at least for purposes of providing public education. In addition to financing education and supplying funds directly to local districts, the federal government would supplant the states in regulating the quality of education provided by the local districts. Decisions as to whether and to what extent to regulate curriculum, teacher qualifications, and other aspects of the educational process would now be in federal hands, presumably via a federal department of education operating much like today's state school boards.

Whether state or federal oversight of local school districts is preferable seems an open question. On the one hand, state elected and appointed officials may be more responsive than federal officials to their children's educational needs, a state-local partnership may operate more efficiently than a federal-local partnership, and state oversight may enable needed experimentation with a greater variety of educational approaches than under a more uniform federal approach. On the other hand, as discussed above, it may be easier to overcome entrenched political power impeding needed reforms at the federal than at the state level. For example, state initiatives to bring about more racial and class integration have been limited and largely unsuccessful, due in large part to the political power of suburban areas in state legislatures.⁷³ Perhaps the federal gov-

73. Two states, Massachusetts and Connecticut, have laws requiring local school authorities to correct racial imbalance in their schools. See MASS. GEN. LAWS ANN. ch. 71, § 37D (West 2009); see also CONN. GEN. STAT. ANN. § 10-226a to -226h (West 2002 & Supp. 2009). I have been unable to find data on the success of these laws. Depending on the details of how the laws operate, they may run afoul of the Supreme Court's invalidation of race-conscious integration plans in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). A possible alterna-

ernment could achieve greater success, as with the federal promotion of equal educational opportunity in other respects today.

3. (3) *Total Federalization*

Federal control would be greatest with total federalization, the abolition of local school districts, the creation of a federal school system administered by a federal agency, and mandatory attendance at the federal schools. Being responsible for financing education and in control of how much is spent on each child, the agency could endeavor to allocate funds equitably among all students. Being responsible for assigning students to schools, the agency could institute attendance plans designed to promote class and racial integration. Being responsible for curriculum, the agency could establish standards designed to provide a comparable educational opportunity to students nationwide. In order to gain the benefits of decentralization, the agency could manage schools through regional offices and local school superintendents, could delegate to them the authority to tailor educational programs to meet their students' needs, and could provide for parental involvement in the decision-making process in order to promote responsiveness and accountability. But these officials would ultimately be responsible to the central agency, and whatever benefits flow from the local election or appointment of school officials would be lost. Moreover, those opposed to total federalization and able to afford it might opt out of the system for private schools, thereby undermining the benefits of federalization.

In sum, all three models or variations of them—full federal financing, the federal takeover of the states' role, and total federalization—might promote more nearly comparable educational opportunity than the present reliance on state and local governments. At a minimum, full federal financing of public schools seems necessary. Whether the displacement of

tive to race-based integration is class-based plans, which have been adopted voluntarily by several local school districts but as yet have not been mandated by any states. *See, e.g.*, RICHARD D. KAHLENBERG, *RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION* (2007), available at <http://www.tcf.org/publications/education/districtprofiles.pdf> (describing socio-economic integration plans in twelve of approximately forty school districts using them, and concluding that properly designed plans can promote racial integration and boost academic achievement). However, as a practical matter many school districts, particularly in central cities, have so few white and middle-to-upper income students that achieving racial and class integration is impossible. *See, e.g.*, ORFIELD & LEE, *INTEGRATION STRATEGIES*, *supra* note 46. Achieving integration in those settings will likely require opening up to those trapped in central cities the suburban communities in which middle to upper income families have insulated themselves. Only a few state legislatures have taken steps to combat the exclusionary zoning barriers many suburban communities have adopted to preserve their insularity, and only with modest success. *See, e.g.*, Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 72-85 (2001) (arguing that the few state legislative efforts to combat exclusionary zoning have resulted in minimal racial or socio-economic integration).

the states' role through federal takeover, or of both the state and local roles through total federalization, is needed depends on the relative effectiveness of the three levels of government in administering the various aspects of public education other than financing. That is a question which can only be answered in practice and about which there will likely be continuing disagreement.

D. *The Validity and Viability of a Greater Federal Role*

An increased federal role may be necessary, but whether it is legally valid or politically viable is another matter. The validity of all the models depends on the scope of federal power. The Supreme Court has interpreted the Tenth Amendment's protection of states' rights to forbid the federal government from ordering states to pass laws or implement federal programs.⁷⁴ Consequently, the federal government could not simply mandate states and localities to run their educational systems in accordance with federal standards. So far the Court has not used the Tenth Amendment to limit the federal spending power. Thus, strings attached to federal money, as with most of the existing federal interventions into public education, is currently an available route.⁷⁵ Whether the Court would in-

74. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that requirement of Brady Handgun Violence Prevention Act that state law enforcement officers conduct background checks of prospective gun purchasers impermissibly intrudes on state sovereignty implicit in the Constitution); *New York v. United States*, 505 U.S. 144 (1992) (holding requirement of Low-Level Radioactive Waste Policy Act that states failing to regulate the disposal of waste generated within the state must take title to and possession of the waste effectively mandates states to pass laws to implement federal law in violation of Tenth Amendment).

75. See U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to tax and spend to "provide for the . . . general welfare of the United States"). While the Supreme Court could conceivably strike down a statute as somehow not in furtherance of the general welfare, it has not done so and has taken the position that "[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). It is hard to imagine the Court ever invalidating spending to promote public education as not serving the general welfare. Moreover, as long as Congress clearly expresses its intent, the Court has acknowledged that Congress has broad power to attach conditions to federal money on the ground that states need not accept the money and are in effect contractually bound if they do. See David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S. DAK. L. REV. 496 (2007) (discussing contract law rationale for conditions on states' receipt of federal funds). While intimating that it might invalidate conditions insufficiently related to the purpose of the funded program, see *Dole*, 483 U.S. at 207, the Court has never actually done so and this limitation would seem to pose no obstacle to conditions regulating the educational programs for which federal money has been appropriated. Conditions are valid even if Congress otherwise lacks the power to directly regulate the matter. See *id.* (upholding condition attached to federal highway funding that states impose minimum drinking age, even assuming the Twenty-First Amendment bars Congress from directly doing so). Conditions are valid even when conferring on local government powers denied under state law. See *Lawrence County v. Lead-Deadwood Sch. Dist.* No. 40-1, 469 U.S. 256, 258 (1985) (holding that Payment in Lieu of Taxes Act provision

voke the Tenth Amendment if the federal government tried to use the spending power to fully finance public education and prohibit state and local supplementation, to take over the states' role in superintending local school districts, or to totally federalize education and establish a federal public school system, is hard to say and likely depends on the ideological tilt of the Court at the time. The basis of a decision striking down federal intervention would likely be that public education is a traditional state function that the federal government may control to a limited degree but not so extensively as per the three models.⁷⁶ While such a decision is certainly conceivable, my view is that the extent of the federal role should be treated as a political question, on the ground that tradition should not stand in the way of progress in education and that the political process is the appropriate place to resolve whether an increased federal role would be progressive.⁷⁷

The political will for an increased federal role of the scope envisioned here does not seem likely at the present time. However, it is possible that the country is entering an era of greater reliance on the federal government for matters of national significance. The effort to adopt some form of universal health insurance is an example. Most people view access to health care and education as matters of high and roughly comparable priority.⁷⁸ If universal health insurance comes about, it will occur due to

authorizing local governments to use funds received under the Act for "any governmental purpose" overrides state statute requiring local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues).

76. For a similar argument regarding the minimum wage, see *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding Congress may not regulate minimum wages of state and local governmental employees under the Commerce Clause, and stating that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3"), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

77. See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAPMAN L. REV. 89, 89 (2001) (arguing that "Congress's spending power should be broadly interpreted" and that "the Tenth Amendment should not be applied as a limit on the spending power or on Congress's ability to place conditions on its spending"); Aviam Soifer, *Truisms that Never Will Be True: The Tenth Amendment and the Spending Power*, 52 U. COLO. L. REV. 793, 800 (1986) (arguing that "the Tenth Amendment provides no constitutionally enforceable barrier against congressional action"). But see Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195, 198 (2001) (arguing that "the modern Congress regularly uses fiscal redistribution among the states and conditional federal spending to impinge, intentionally or unintentionally, on the autonomy that the Framers sought to guarantee the states," that "these intrusions on state autonomy reduce aggregate social welfare," that "the states cannot protect themselves through the federal political process against Congress's exercise of its spending power," and that the Court should be willing to limit Congress's spending power in order to protect states' rights).

78. In public opinion polls Americans consistently rank education and health care among their highest priorities. See *PollingReport.com*, Problems and Priorities, <http://www.pollingreport.com/prioriti.htm> (last visited Apr. 7, 2010).

public recognition that the private market has not adequately met the need for a good as fundamental as health care. If the public were to come to see the existing educational system as similarly inadequate, federal intervention might become viable.

Perhaps the greatest obstacle to federal intervention is the traditionally primary role of state and local government in public education. That tradition may have been sensible at a time when wealth inequalities were not as great or as entrenched as today, when education may not have been quite as central to success in life as today, and when states and localities were less interdependent. Tradition can linger even after the conditions giving rise to it have changed and are no longer applicable. Because it represents at least a modest break with tradition, the adoption of No Child Left Behind seems significant in this regard. If greater federal intervention comes about in the future, No Child Left Behind will likely be seen as the first step down that path. If No Child Left Behind ends up being scrapped as a failed federal intervention, then the existing system is likely to endure for some time.

VI. CONCLUSION

Democratic principles, the inherently equal moral worth of all people, and the requirement of equitable sharing mandate that society afford all children a comparable educational opportunity suited to their needs. In a society as inegalitarian as the United States, comparability requires governmental provision of education. And it requires federal provision at least to the extent of financing the full cost of education, and perhaps more so depending on its capacity as against state and local governments of promoting comparability in other respects. Federal provision will only come about, though, through a mass movement of those in this country whose children do not have comparable opportunity. Without such a movement, the inequalities of the educational system as presently structured will likely persist indefinitely.

